STATE OF MICHIGAN

COURT OF APPEALS

STACEY RILEY,

Plaintiff-Appellant,

v

ROBERT ENNIS,

Defendant-Appellee.

UNPUBLISHED
February 25, 2010

No. 290510
Genesee Circuit Court
LC No. 08-090154-CL

Before: Fitzgerald, P.J., and Cavanagh and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) and dismissing her discrimination claim against defendant under the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq.*, based on an arbitration agreement. We reverse. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

We review de novo a trial court's summary disposition ruling and whether an issue is subject to arbitration. *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 152; 742 NW2d 409 (2007). Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred because of an agreement to arbitrate. In reviewing a motion under MCR 2.116(C)(7), the contents of the plaintiff's complaint are accepted as true unless contradicted by documentary evidence filed or submitted by the parties. *RDM Holdings, LTD v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008). When deciding a motion for summary disposition, a court may determine the meaning of a contract only if its terms are not ambiguous. *D'Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 319; 565 NW2d 915 (1997). A contract is ambiguous if two provisions irreconcilably conflict or a term is equally susceptible to more than one meaning. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). If a factual dispute exists, summary disposition is not appropriate. *RDM Holdings, LTD*, 281 Mich App at 687.

An arbitration agreement is a matter of contract under Michigan law. *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 156; 596 NW2d 208 (1999). Here, the arbitration provision is contained in an employment contract, and it is clear from the terms of the agreement that the only parties to the contract are the Ennis Center for Children, Inc., ("Ennis Center"), and plaintiff. The employment contract defines the Ennis Center as "the Agency," and provides, in pertinent part:

> The employee and the Agency agree that if the employee has *any dispute with the Agency* concerning his/her employment or termination of employment (including any allegation of breach of contract or discrimination), such dispute shall be submitted to arbitration administered by the American Arbitration Association under its Employment Arbitration Rules. . . . [Emphasis added.]

Although defendant signed the employment contract, the contract specifies that he did so "For the Agency." It is well settled that a corporation can only act through its officers and agents. *Oakland Co v Allen*, 295 Mich 61, 74; 294 NW 98 (1940). "A characteristic of an agent is that he is a business representative. His function is to bring about, modify, accept performance of, or terminate contractual obligations between his principal and third parties." *Uniprop, Inc v Morganroth*, 260 Mich App 442, 448; 678 NW2d 638 (2004). "Unless otherwise agreed, a person making or purporting to make a contract with another as agent for a disclosed principal does not become a party to the contract." *Riddle v Lacey & Jones*, 135 Mich App 241, 246; 351 NW2d 916 (1984), quoting 2 Restatement Agency, 2d, § 320, p 67. "The manner in which an agent's name appears in a contract is often relevant to establishing whether the agent agreed to become a party to the contract because it may establish whether the agent has manifested assent to become a party to the contract." Restatement Agency, 3d, § 6.01, comment d(1). Here, the language in the contract specifying that defendant signed it "For the Agency" clearly indicates that he signed the contract solely as an agent for the Ennis Center.

Plaintiff's claim against defendant implicates his potential personal liability under the CRA, not the Ennis Center's potential vicarious liability for defendant's alleged discriminatory conduct. See *Elezovic v Ford Motor Co*, 472 Mich 408, 426; 697 NW2d 851 (2005) see also MCL 37.2201(a) ("employer" means a "person who has 1 or more employees, and includes an agent of that person"); MCL 37.2201(1)(a) ("employer" shall not discriminate against an individual with respect to employment). We note, however, that a statutory action is not the sole basis for an agent to acquire personal liability when acting in an agency capacity. A corporate agent or officer of a corporation may acquire personal liability for torts or criminal acts in which he or she actively participates. See *Attorney Gen v Ankersen*, 148 Mich App 524, 557; 385 NW2d 658 (1986); *Baranowski v Strating*, 72 Mich App 548, 559; 250 NW2d 744 (1976).

But regardless of the basis for plaintiff's personal liability claim against defendant, when interpreting an arbitration agreement, "a court should not interpret a contract's language beyond determining whether arbitration applies and should not allow the *parties* to divide their disputes between the court and arbitrator." *Fromm v MEEMIC Ins Co*, 264 Mich App 302, 306; 690 NW2d 528 (2004) (emphasis added). The rationale for not allowing the bifurcation of the dispute is that it will defeat the efficiency of arbitration and undermine its value. *Id.* at 306. But this is not a case where plaintiff's dispute with the Ennis Center has the potential for bifurcation. The potential bifurcation arises from the fact that defendant is not a party to the arbitration provision in the employment contract and, therefore, plaintiff's claim against him must be resolved in a different forum.

We reject defendant's argument that the clause specifying that the "agreement shall be binding on the heirs and representatives of parties hereto" allows him or any other person, as Ennis Center's agent, to compel arbitration in an individual capacity. The phrase does nothing more than state what the law might presume in the absence of express language to bind heirs and representatives of a contracting party. See *In re Traub Estate*, 354 Mich 263, 279; 92 NW2d 480

(1958) (in the absence of express language in contract, the law generally presumes that contracting parties intend to bind themselves and personal representatives); see also *Ballard v Southwest Detroit Hosp*, 119 Mich App 814, 817; 327 NW2d 370 (1982).

The phrase "agreement shall be binding on the heirs and representatives of parties hereto" also does not make defendant an intended third-party beneficiary of any contractual promise under MCL 600.1405. See *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 427; 670 NW2d 651 (2003) (only intended beneficiaries of a contractual promise may enforce the promise as a third-party beneficiary). Further, we decline to apply the broad construction given to an arbitration provision in a stock purchase agreement in *Arnold v Arnold Corp*, 920 F2d 1269 (CA 6, 1990), for purposes of holding that corporate agents had a right to compel arbitration of claims brought against them in an individual capacity. The mere fact that an individual is a corporate agent does not reveal an intent to protect the individual through arbitration. *McCarthy v Azure*, 22 F3d 351 (CA 1, 1994). Unlike the broad language in *Arnold* that was found to reflect a basic intent to provide for a single arbitral forum to resolve any disputes arising out of a stock purchase agreement, plaintiff and the Ennis Center did not agree to arbitrate any dispute arising out of the employment relationship. The arbitration provision is confined to disputes with "the Agency," which is defined as the Ennis Center.

A valid contract requires mutual assent. *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 548-549; 487 NW2d 499 (1992). Where mutual assent is established, it is not necessary that the arbitration be signed in order for it to be binding. *Ehresman v Bultynck & Co, PC*, 203 Mich App 350, 354; 511 NW2d 724 (1994). But "a party cannot be required to arbitrate when it is not legally or factually a party to the agreement." *St Clair Prosecutor v AFSCME*, 425 Mich 204, 223; 388 NW2d 231 (1986). Stated otherwise, a party cannot be required to arbitrate an issue that the party did not agree to submit to arbitration. *Hetrick v David A Friedman, DPM, PC*, 237 Mich App 264, 267; 602 NW2d 603 (1999), disapproved on other grounds in *Wold Architects & Engineers v Strat*, 474 Mich 223, 232 n 3; 713 NW2d 750 (2006).

Although plaintiff's claims against defendant might be interwoven with her claims against the Ennis Center, because plaintiff and the Ennis Center did not agree to give the Ennis Center's agents the protection of the arbitration provision in the employment contract with respect to their own potential individual liability, we conclude that defendant cannot compel arbitration. Cf. *McCarthy*, 22 F3d at 357-358 (arbitration provision in purchase agreement did not cover corporate purchaser's employees). Thus, the trial court erred in granting defendant's motion for summary disposition.

Reversed.

/s/ E. Thomas Fitzgerald
/s/ Mark J. Cavanagh
/s/ Alton T. Davis